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UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Twenty-sixth session

SUMMARY RECORD OF THE 500th MEETING

Held at the Vienna International Centre, Vienna,
on Thursday, 8 July 1993, at 9.30 a.m.

Chairman: Mr. MOHAMMED (Nigeria)

CONTENTS

New international economic order: procurement (continued)

Consideration of draft Model Law on Procurement (continued)

Articles 13 and 14 (continued)

Article 15

Article 16

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The meeting was called to order at 9.40 a.m.

NEW INTERNATIONAL ECONOMIC ORDER: PROCUREMENT (continued) (A/CN.9/371, A/CN.9/375, A/CN.9/376 and Add.1 and 2, A/CN.9/377)

Consideration of draft Model Law on Procurement (continued)

Articles 13 and 14 (continued)

1. Ms. PIAGGI-VANOSSI (Argentina), recalling the statement made by her at the previous meeting and the Chairman's comment on it, said she had been referring to two-stage tendering, which was used in cases where the procuring entity was not in a position to formulate detailed specifications with sufficient precision to be able to open tendering proceedings. Article 23 provided for clarifications and modifications of the solicitation documents, and she had wished to suggest that the possibility of requesting clarifications and modifications of the contract itself also be provided for.

2. Mr. JAMES (United Kingdom) asked whether the representative of Argentina would agree to a postponement of consideration of the point raised by her until the Commission came to chapter III.

3. The CHAIRMAN said the representative of Argentina had indicated that she would agree to a postponement.

4. Mr. TUVAYANOND (Thailand) said he still had misgivings about the wording of article 13. Military procurement was, of course, excluded from the Model Law's scope of application, but national authorities might wish procurement details not to be made public for reasons other than national security or national defence - such as the desire to protect industrial secrets.

5. Mr. JAMES (United Kingdom) said that the point made by the representative of Thailand was probably covered by subparagraph (1) (c) of article 14. In document A/CN.9/377, the Secretariat was suggesting the deletion of that subparagraph, but he hoped that it would be retained. There was a difference between having a general rule as to whether the Law applied to defence procurement and deciding in a particular case whether tendering proceedings were appropriate. For example, one could have a general rule that the Law applied to aircraft procurement and then make exceptions on a case-by-case basis. Therein lay the importance of subparagraph (1) (c) of article 14.

6. The CHAIRMAN said that the point raised by the representative of Thailand might best be resolved during consideration of subparagraph (1) (c) of article 14; he therefore called upon the Secretariat to explain why it was suggesting in document A/CN.9/377 that the subparagraph be deleted.

7. Mr. SAHAYDACHNY (Secretariat) said that, in the light of the discussion on article 14, and in particular the comment just made by the representative of the United Kingdom, the Secretariat now felt that the subparagraph was not redundant and should therefore be retained.

8. Mr. BONELL (Italy) said that in subparagraph (1) (c) reference was made to "article 1 (2)", whereas the correct reference should be to "article 1 (3)".

9. The CHAIRMAN, noting that the typographical error would be corrected, said he took it that the Commission wished to retain subparagraph (1) (c).

10. It was so decided.

11. The CHAIRMAN invited comments on the suggestion of the Secretariat, contained in document A/CN.9/377, that ", in the judgment of the procuring entity," be inserted between "when" and "engaging" in subparagraph (1) (d) of article 14.

12. Mr. WALLACE (United States of America), advising caution with regard to the Secretariat's suggestion, said that in the Working Group some representatives had felt that the procuring entity should not be able to resort automatically to informal procedures if all tenders had been rejected; consequently, the phrase "when engaging in new tendering proceedings would be unlikely to result in a procurement contract" had been introduced as a kind of objective standard. Insertion of ", in the judgment of the procuring entity," would rob that phrase of its objective character, particularly as there would be no possibility of contesting the procuring entity's judgment. One should not make it too easy to opt for informal rather than formal procedures.

13. Mr. LEVY (Canada) said that, while there was admittedly a need for caution, someone had to judge whether "engaging in new tendering proceedings would be unlikely to result in a procurement contract". The amendment suggested by the Secretariat made it clear that it was the procuring entity that would do so.

14. Mr. KOMAROV (Russian Federation) said he also supported the Secretariat's suggestion, especially since there was no risk that overly great powers would thereby be accorded to the procuring entity: the chapeau of paragraph (1) provided that the actions of the procuring entity should be subject to approval by an appropriate State organ.

15. Mr. RAO (India) also supported the Secretariat's suggestion.

16. The CHAIRMAN took it that the Commission accepted the Secretariat's suggestion.

17. It was so decided.

18. Mr. KLEIN (Observer for the Inter-American Development Bank) suggested that the words "therefore be impossible or imprudent" in subparagraph (2) (a) be replaced by something on the lines of "not deliver the goods or produce the work when required".

19. Subparagraph (2) (b) seemed unnecessary, since a catastrophic event was simply one example of an occurrence that could give rise to an urgent need. The question of catastrophic events could perhaps be dealt with in the Guide to Enactment.

20. Mr. JAMES (United Kingdom) said he had no objection to the suggestion made by the observer for the Inter-American Development Bank regarding the words "therefore be impossible or imprudent". However, a change of the kind suggested would have to be made also in article 16.

(Mr. James, United Kingdom)

21. In his opinion, subparagraph (2) (b) should be retained. There was a substantive difference between it and subparagraph (2) (a), which contained an important proviso. Paragraph (2) (b) had been included because it had been recognized that, after a catastrophic event, there might well not be enough time to consider questions of foreseeability or dilatory conduct. For example, in the current major flooding disaster in the mid-western United States, it would be unreasonable to expect governmental bodies to go through tendering procedures just because there had been no flood wall in one area and serious flooding should therefore have been foreseen.

22. Mr. TUVAYANOND (Thailand) suggested that the word "impossible" in subparagraph (2) (a) be replaced by "impractical".

23. Mr. LEVY (Canada) said he had no objection to the suggestion made by the representative of Thailand.

24. With regard to subparagraph (2) (b), which had been included at the request of the Canadian delegation, a situation could exist where a catastrophic event was foreseeable but nothing had been done about it. In the case of the flooding in the mid-western United States, people should not suffer because a flood wall had not been built in one area. Thus, subparagraph (2) (b) should be retained.

25. If "impossible" was changed to "impractical" in subparagraph (2) (a), that change should also be made in subparagraph (2) (b).

26. Mr. KLEIN (Observer for the Inter-American Development Bank) said he would not press his suggestion regarding subparagraph (2) (a). With regard to subparagraph (2) (b), he said that disasters were regarded as unforeseeable in insurance law.

27. Mr. GRIFFITH (Observer for Australia) supported the substitution of "impractical" for "impossible" and suggested that the words "or imprudent" be deleted in subparagraphs (2) (a) and 2 (b). He also suggested that in subparagraph (2) (b) the words "amount of" be deleted.

28. With regard to subparagraph (2) (a), it seemed unrealistic to make an exception for cases of urgent need if the need was to be subject to a "foreseeability test", particularly as the concept of "foreseeability" was a highly subjective one. Weeks of litigation might be necessary in order to establish whether the circumstances giving rise to an urgency were or were not foreseeable. He therefore felt that "foreseeable by, or" should be deleted.

29. Mr. PEREZNIETO CASTRO (Mexico), supported by Mr. PARRA PEREZ (Observer for Venezuela), said, with regard to the word "impossible" in subparagraph (2) (a), that the procuring entity might manoeuvre in such a way that engaging in tendering proceedings actually became impossible. Although he could accept the replacement of "impossible" by "impractical", he feared that the procuring entity would still have that possibility.

30. Where subparagraph (2) (b) was concerned, he did not think that use of the word "impractical" was appropriate.

31. Mr. TUVAYANOND (Thailand) considered the phrase "because of the amount of time involved in using those methods" in subparagraph (2) (b) to be rather a negative comment on tendering proceedings and suggested instead the phrase "because of time constraints".

32. One reason why he believed that "impractical" was preferable to "impossible" in subparagraph (2) (b) was that, although it might be possible to engage in tendering proceedings, they might take so long that the needs of the catastrophe victims would go unmet.

33. Mr. LEVY (Canada), explaining the reason for the proviso in subparagraph (2) (a), said that a procuring entity about to - say - engage contractors to build a highway in the north-eastern United States, where road-building in winter was impossible owing to the harsh climate, might avoid tendering proceedings by waiting until autumn and then claiming that there was not enough time to call for tenders because of the need to start work immediately.

34. Mr. AL-NASSER (Observer for Saudi Arabia) proposed that the word "direct" be added before "competitive negotiation" in the chapeau of paragraph (2).

35. Mr. WALLACE (United States of America), commending the explanation given by the Canadian representative, said it should not be made easy for the procuring entity to move into competitive negotiation or sole-source procurement.

36. Regarding the proposal made by the observer for Saudi Arabia, he said that, in his opinion, "competitive negotiation" was a technical term and could not be qualified in the manner proposed.

37. Mr. PHUA (Singapore) noted that in paragraph (1) of article 14 procurement by two-stage tendering and competitive negotiation was subject to approval by a State-designated organ, whereas procurement by competitive negotiation was not subject to such approval in paragraph (2). What was the reason for the difference?

38. Mr. LEVY (Canada) said that, if his memory served him well, the Working Group had not included the approval provision in paragraph (2) as that would have been inconsistent with the need to take urgent decisions.

39. Mr. PHUA (Singapore) asked whether the State-designated organ could, for its own reasons, order competitive negotiation in a situation where there was no urgent need for the goods or construction.

40. Mr. JAMES (United Kingdom), noting that in article 16 single-source procurement when there was an urgent need for the goods or construction was subject to approval by a State-designated organ, said that in his opinion the fact that in paragraph (2) of article 14 there was no approval provision was probably due to an oversight on the part of the Working Group.

41. Regarding the second question asked by the representative of Singapore, he said that a major point of the draft Model Law was that competitive negotiation should not be engaged in merely because the procuring entity or some other organ thought it fit to opt for that procurement method.

42. Mr. LEVY (Canada), agreeing with the United Kingdom representative, said that on reflection he thought that the approval provision should be included in paragraph (2) also.

43. Mr. TUVAYANOND (Thailand) said he was by no means sure that the absence of an approval provision in paragraph (2) was the result of an oversight.

44. Mr. KOMAROV (Russian Federation) said he did not think it was the result of an oversight. Admittedly article 16 contained the approval provision, but that was because single-source procurement precluded competition whereas a major purpose of the draft Model Law was to promote it. Competitive negotiation, on the other hand, did not preclude competition, so that there was no need for the approval provision in paragraph (2) of article 14.

45. The CHAIRMAN said that, in paragraph (2), as elsewhere, the approval provision would be in parentheses, indicating that it was an optional provision.

46. Mr. AL-NASSER (Observer for Saudi Arabia) said that, when the procuring entity engaged in competitive negotiation pursuant to paragraph (2), it should do so with a number of suppliers or contractors in order to ensure a fair price and effective implementation of the contract.

47. The CHAIRMAN said there would be an opportunity to discuss that point under article 33.

48. He took it that the Commission wished to adopt article 14 with "impossible or imprudent" replaced by "impractical" in subparagraphs (2) (a) and (b), with the words "amount of" deleted in subparagraph (2) (b) and with the approval provision added at the beginning of paragraph (2).

49. It was so decided.

Article 15

50. Mr. GRIFFITH (Observer for Australia) suggested that a definition of "quotation" be provided in article 2.

51. Mr. HUNJA (Chairman of the Working Group) said that, after considerable debate, the Working Group had decided not to provide procedural definitions.

52. Mr. AZZIMAN (Morocco) suggested that in the title of the article "recourse to" be substituted for "use of" and that the same change be made in the titles of articles 14 and 16.

53. Mr. KLEIN (Observer for the Inter-American Development Bank) said that, where there was a monetary threshold above which public tendering was required, procurement requests were often artificially subdivided in order to avoid the need for public tendering. He therefore suggested that the rule contained in paragraph (2) be made a general rule.

54. Mr. NICOLAE-VASILE (Observer for Romania) suggested that the proviso in paragraph (1) that the estimated value of the procurement contract should be less than the amount set forth in the procurement regulations be supplemented by a reference to international anti-dumping rules.

55. Mr. JAMES (United Kingdom), responding to the suggestion made by the observer for the Inter-American Development Bank, said that article 15 was the only article in which permission to adopt a procurement method other than public tendering - namely, a request for quotations - was based on the estimated value of the procurement contract. In other articles there was no reliance on estimated value, so there was no need for a general rule. After lengthy discussions regarding other procurement methods, the Working Group had agreed that a monetary threshold was inappropriate except in the case of a request for quotations.

56. The matter raised by the observer for Romania was one for decision by individual States or for consideration within the framework of an organization like GATT rather than of a body like the Commission.

57. Ms. ZIMMERMAN (Canada) supported the remarks of the representative of the United Kingdom.

58. Mr. WALLACE (United States of America), supporting the remarks made by the representative of the United Kingdom in response to the suggestion of the observer for the Inter-American Development Bank, said that States basing legislation on the Model Law might be requested in the Guide to Enactment not to set monetary thresholds below which public tendering was not required - or, if they did set such thresholds, to make them subject to the provision that there be no arbitrary division of contracts.

59. Mr. TUVAYANOND (Thailand), agreeing with the suggestion made by the representative of the United States of America, asked whether it would be permissible under the Model Law to divide work on, say, large-scale construction projects among a number of contractors. He also asked how it would be possible to establish that the procuring entity had divided such work up in that way for the purpose of invoking paragraph (1) of article 15 rather than for other purposes.

60. The CHAIRMAN, in response to the latter question, said that there were provisions in the draft Model Law requiring procurement procedures and approvals to be recorded.

61. Mr. KLEIN (Observer for the Inter-American Development Bank) agreed with the suggestion made by the representative of the United States of America in response to his own suggestion.

62. Mr. PEREZNIETO CASTRO (Mexico) said that in principle public tendering should always be required and that the exceptions should be as few as possible. The Model Law should make that clear.

63. The CHAIRMAN, noting that there did not appear to be general support for the suggestion that a definition of "quotation" be provided, took it that the Commission would like the Guide to Enactment to include a request concerning

(The Chairman)

monetary thresholds along the lines suggested by the representative of the United States of America.

64. He also took it that the Commission wished to adopt article 15 with "use of" replaced by "recourse to" in the title.

65. It was so decided.

Article 16

66. The CHAIRMAN said that, in the absence of objections, he took it that the Commission wished to adopt the chapeau and paragraph (a) as submitted by the Working Group in the annex to document A/CN.9/371.

67. It was so decided.

68. The CHAIRMAN took it that the Commission wished the word "impractical" to be substituted for the words "impossible or imprudent" in paragraph (b), for consistency with paragraph (2) of article 14, and that it wished to adopt paragraph (b) with that change.

69. It was so decided.

70. The CHAIRMAN took it that, in paragraph (c), the Commission wished the word "impractical" to be substituted for the words "impossible and imprudent" and the words "amount of" to be deleted and that it wished to adopt paragraph (c) with those changes.

71. It was so decided.

72. The CHAIRMAN said that, in the absence of any objections, he took it that the Commission wished to adopt paragraphs (d), (e) and (f) as submitted by the Working Group in the annex to document A/CN.9/371.

73. It was so decided.

74. Mr. SAHAYDACHNY (Secretariat), drawing attention to the Secretariat's observation in document A/CN.9/377 regarding paragraph (g), noted that the paragraph did not specify what body was to issue the approval referred to in it.

75. Mr. WALLACE (United States of America) said it was possible to infer that the approval might be issued by the State-designated organ referred to in the chapeau of article 16. However, as the nature of the approval in question was different from that of the other - optional - approvals, perhaps a different body should be designated.

76. Mr. TUVAYANOND (Thailand) proposed that the word "by", followed by a blank, be added after "approval".

77. Mr. JAMES (United Kingdom) supported the proposal.

78. Mr. PRIESTLEY (Observer for Australia) said that the question of the organ designated to issue the approval should be dealt with either in paragraph (g) or in the Guide to Enactment.

79. Mr. GRUSSMANN (Austria) suggested that "approval" be replaced by some form of words like "governmental authorization" in order to make it clear that the approval was intended to cover a special situation.

80. The Guide to Enactment should explain that the mandatory approval required by paragraph (g) did not necessarily involve duplication, the approval provided for in the chapeau of article 16 being optional.

81. Mr. LEVY (Canada) said that the problem of duplication could be resolved by adopting the proposal made by the representative of Thailand and by explaining in the Guide to Enactment that the organ issuing the approval provided for in the chapeau of article 16 would not be expected also to issue the approval required by paragraph (g).

82. Ms. CRISTEA (Observer for Romania) asked whether paragraph (g) applied to both international and domestic suppliers and contractors and how, when engaging in sole-source procurement under paragraph (g), Governments could be persuaded to take account of comments made in response to the envisaged public notice.

83. The CHAIRMAN said that such questions could best be addressed when the Commission came to consider the Guide to Enactment.

84. Mr. BONELL (Italy) said he was not clear about the relationship between the approval required by paragraph (g) and the approval provided for in the chapeau of article 16. Also, the meaning of "public notice" and of "adequate opportunity to comment" was not obvious.

The meeting rose at 12.35 p.m.